U.S. Department of Labor

Board of Contract Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Date: DEC 4, 1996

Case No.: 95-BCA-2

Appeal of

FERRELL CONSTRUCTION OF TOPEKA, INC.

Contract No.: 99-1-4886-14-007-01

Before: Administrative Law Judges Miller and Levin

DECISION AND ORDER GRANTING APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM RELATED TO ACCESS PANELS/FILTER GRILLES

Statement of the Case and Undisputed Facts

This controversy derives from a timely appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§601, et seq., from a final decision of Contracting Officer John Steenbergen dated March 7, 1995. Appellant has filed a motion for summary judgment on the Contracting Officer's claim for costs incurred in replacing 121 access panels/filter grilles which covered the fan coil units in the ceilings of Building I.O.O.F. of the Flint Hills Job Corps Center project in Manhattan, Kansas. The access panels are alleged to have been improperly sized by the Appellant construction contractor ("Appellant" or "Ferrell"), because as installed they did not allow access for maintenance. The Contracting Officer alleges that such access was required by the applicable specification in the project plans. Appellant denies liability for any deficiency of construction performance in this regard, and contends that it installed the access panels or filter grills in the I.O.O.F. Building precisely in accordance with the governing specification in Note 3 on Sheet MI..13 of the architectural plans for that building. Note 3 reads in its entirety:

> Filter Grille shall be 12" wide and length determined by size of unit. Shall be minimum of 12" longer than return air plenum (6" each side to allow access to valves, motor connections, etc.) Provide tork (sic) head screws to secure hinged door to frame. Secure grille frame to metal stud frame all four sides."

(Agreed Statement of Fact 16)

The access panels are shown in section in three details on sheet M1.13, details 1, 9, and 10,

but without dimensions. Each detail refers to plan Note 3. (Agreed Statement of Fact 17, Appellant's Exhibit 1) The drawings and specifications were prepared by the Architect/Engineer under contract with the Department of Labor, and are part of the construction contract. (Agreed Statement of Fact 2, 3, 17, 33)

Appellant and its mechanical construction subcontractor interpreted this contact provision to require an unvarying dimension of 12" width on each grille installed, with a varying length of 12" longer than the return air plenum in each case. The return air plenums varied somewhat in size, but typically would result in a dimension of 37 1/4" in length, rounded to 38". Appellant construed the provision for six inches on each side of the plenum to account for the requirement that the access panel be a minimum of 12" longer than the return air plenum. Appellant through its mechanical subcontractor submitted shop drawings of the access panels to the Architect /Engineer, who approved them on January 15, 1991, with a comment which has not related to the size of the access panels. Appellant submitted another shop drawing showing the length of the return air plenum, which was approved by the Architect/Engineer on January 17, 1991. (Agreed Statement of Fact 18, 21, 22, 23, 24, 25) All of the panels that were installed by Appellant were twelve inches wide, but of varying lengths. (Appellant's Exhibit 13) When the Architect/Engineer did the final inspection and prepared a "punch list" for the Project, noting defects and deficiencies in the I.O.O.F. Building prior to acceptance, he did not identify the access panels or filter grilles on the fan coil units as requiring any further work. (Agreed Statements of Fact 15, 32)

The Contracting Officer rejected the installation of the filter grille/access panels by Appellant, however, because, as installed, they did not allow access to valves, motor connections, and other parts of the covered fan coil units for system balancing and maintenance. The Contracting Officer contends that Appellant's interpretation of the contract language in Note 3 "is unreasonable and directly at odds with the clear intent of the contract." (Contracting Officer's brief at 6) The Contracting Officer contends that it is evident from the language in Note 3 that the purpose of the provision was to allow access to the fan coil units for necessary maintenance and repair, and that Appellant's interpretation effectively eliminates that requirement from the contract and renders the entire provision meaningless. Thus, the Contracting Officer contends that Appellant's interpretation of Note 3 is clearly unreasonable because in giving effect to the dimensional provisions of the Note 3, it fails to take into account the requirement that the access panels must provide "access to valves, motor connections, etc." Although there is no Agreed Statement of Fact that explicitly states that necessary access to the fan coil units was rendered either impossible or extremely difficult by the size of the access panels which Appellant actually installed, this is a fact which we do not consider to be in substantial dispute. Appellant contends that any fault was in the specification, which it contends was not ambiguous, and which it contends it followed exactly.

There is no indication in the record before this Board that there was any request for clarification of the specification by the Appellant Contractor. There is no indication that the problem of access to the fan coil units was recognized by the Contracting Officer until, following completion of the project, it was discovered that the air conditioning system could not be balanced as required by the contract because it was not possible to reach the necessary valves and parts of the fan coil, units through the grilles as installed. The Contracting Officer contends that this was because

Appellant did not follow the specifications regarding the size of these access panels. (Statements of Fact 5, 6, 7, 8, 9, 14)

When Appellant refused the Contracting Officer's demand to reinstall larger panels to correct the alleged defect, the Contracting Officer let a remedial contract to replace all the access panels installed by Appellant with new uniform sized hinged panels 24" side and 48" long. (Agreed Statements of Fact 9, 10, 11, 12, 13, 27) The cost to the Government of this remedial installation was $49,994, for which it contends Appellant is liable..

Issues

1. Whether the contract provision contained in Note 3 was ambiguous? If so, was the ambiguity patent or latent?

2. Did Appellant fulfill the requirements of the contract provision?

3. Was the Contracting Officer entitled to demand correction, and upon Appellant's refusal, to replace the allegedly defective access panels with larger access panels at Appellant's expense?

Discussion and Conclusions of Law

Analysis of the specification contained in Note 3, sheet M1.13, of the project plans reveals a contract provision which hindsight discloses was susceptible of various interpretations. The specification, however, is not ambiguous on its face. Ferrell's interpretation of the dimensions is the immediately obvious and plausible one. The parenthetical language referring to "6" each side to allow access to valves, motor connections, etc." is quite reasonably construed as merely descriptive of an assumed result reflected in the language of the specification which is framed in the unequivocally imperative, "Filter grille shall be 12" wide and length determined by size of unit." No alternative interpretation is immediately suggested by the contract language. The fact that access would not be guaranteed by the required dimensions is not apparent from the contract language. We infer that a separate on site or extrinsic investigation of each unit with appropriate measurements would be required to confirm the extent of access through the prescribed access panel. There is no evidence that either party discovered that there was an access problem until after completion of construction. There is no suggestion of bad faith. The fact that there is no evidence that anyone discovered that there was a problem of access posed by the access panels as designed until well after the access panels were delivered and installed, and after various submissions and approvals, confirms that the ambiguity was latent, not patent. Consequently, Appellant had no duty to request clarification.

While it is obvious from the language of the specification that access to the fan coil units was intended and assumed, there is no suggestion in the specification as drafted, with its imperative dimensional language, that the contractor was required independently to verify design accessibility prior to purchase and installation of the filter grilles. Nor do the specifications give guidance as to how any revision of the specified dimensions to accommodate what the Contracting Officer construes as an overriding mandate to provide the needed access should have been accomplished. The

imperative language of the specification, at most, would have imposed a duty upon the Appellant to inquire or request clarification or a change if, prior to or in the course of installation of the filter grilles, he had discovered the lack of essential access to the fan coil units. There is no allegation or evidence that Appellant discovered the lack of access prior to installation. We conclude, under the circumstances, that this specification did not impose upon Appellant a duty independently to test whether the design specification prepared by the Architect/Engineer would accomplish its intended purpose, or to warrant that it would do so. We hold that it would be unreasonable to construe the specification to impose upon Appellant a duty to make an independent design determination that the dimensions specified would, or would not, accomplish their intended purpose. See J. S. Alberici Constr. Co. v. GSA, 94-2 BCA ¶26776 (1994).

We conclude, therefore, that, 1) where the design dimensions are so specific as they are in this case; 2) where the language of the specification is imperative, and nondiscretionary, as it is in this case; 3) where the underlying purpose of access to operating equipment for maintenance and other purposes is contained in an essentially parenthetical, descriptive element of the specification, as drafted, unattended by comparable imperative implementing language, or explicitly imposing an independent duty to test and revise the specification as necessary; and 4) where the incompatibility of the specified dimensions with the purpose is not apparent from the drawings, or disclosed by the approval process, and is not discovered until well after the specification has been implemented, literally, and in good faith, the fault lies in the design, and not the construction implementation. Any ambiguity in the design specification, if there was one, was latent. Therefore, the doctrine of *contra proferentem is* fairly applied to relieve the Appellant construction contractor of liability and to attribute fault to the design as reflected in the design specification. The Contracting Officer was not entitled to demand replacement of the filter grilles installed by Appellant at Appellant's expense. Appellant's motion for partial summary judgment should be granted; the Contracting Officer's cross motion for summary judgment should be denied.

So ordered.

Edward Terhune Miller, Administrative Judge

Concur:

Stuart A. Levin, Administrative Judge